

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

PATRICK JOHN HIGGINS,

Defendant-Appellant.

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UNPUBLISHED  
February 17, 2004

No. 245505  
Eaton Circuit Court  
LC No. 02-020219-FH

Before: Cooper, P.J., and O’Connell and Fort Hood, JJ.

PER CURIAM.

Defendant appeals of right his conviction following a jury trial for breaking and entering a building, MCL 750.110. The trial court sentenced him as an habitual offender, fourth offense to 6 to 20 years in prison. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Defendant test-drove a truck from a dealership to a residential construction site. There, he attempted to remove a refrigerator from one of the partially constructed houses, but he only succeeded in lodging it in the front doorway. When the homeowners arrived and asked about the refrigerator, defendant pretended to be a painter looking for work. He told them he had nothing to do with the refrigerator and left. At trial, he claimed that two men were apparently removing the refrigerator as he arrived at the house, but they drove off in a truck when they saw him coming.

Defendant first argues that the trial court erred when it permitted the prosecutor to ask defendant why he never told the police about the other men at the scene. Defendant argues that the prosecutor’s use of his silence improperly infringes on his right to remain silent. We disagree. We review for abuse of discretion issues regarding the admission of evidence. *People v Hine*, 467 Mich 242, 250; 650 NW2d 659 (2002).

A prosecutor may not introduce evidence of a defendant’s post-arrest, post-*Miranda*<sup>1</sup> silence to impeach a defendant’s exculpatory testimony at trial. *People v Vanover*, 200 Mich

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<sup>1</sup> *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

App 498, 500; 505 NW2d 21 (1993). However, when police arrest a defendant for a crime and do not immediately give him *Miranda* warnings or interrogate him, due process does not prevent a prosecutor from introducing evidence that defendant failed to reveal the exculpatory information. *People v Schollaert*, 194 Mich App 158, 166-167; 486 NW2d 312 (1992). Under such circumstances, the defendant's silence is not a reliance on a legal right, but evidence that the exculpatory circumstances never existed. *People v Cetlinski*, 435 Mich 742, 763; 460 NW2d 534 (1990). As an indication of testimonial fabrication, a prosecutor may properly impeach a defendant's credibility with pre-*Miranda* silence. *Id.*; *Schollaert, supra*.

In this case, the trial court heard evidence indicating that defendant did not receive *Miranda* warnings until his arraignment, apparently because the police were not inclined to interrogate him. Defendant even signed an affidavit affirming that the police never read him his *Miranda* rights. When the prosecutor asked defendant why he did not tell the police about the other truck and its suspicious occupants when he first learned that he faced charges for trying to steal the refrigerator, he simply stated that he was never asked. Therefore, the trial court did not abuse its discretion when it allowed the prosecutor to introduce evidence of defendant's post-arrest, pre-*Miranda* silence to impeach defendant's exculpatory testimony.

Next, defendant argues that he received ineffective assistance of counsel because his trial counsel failed to object to the introduction of other-acts evidence. Specifically, defendant argues that trial counsel failed to object to testimony from a dealership employee which suggested that defendant stole speakers from the back of the truck he was test-driving on the day of the charged crime. We disagree. Because defendant forfeited this issue by failing to argue these grounds below, we review it only for plain error that affected his substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999). In this case, defendant fails to overcome the strong presumption that his trial counsel's actions reflected sound trial strategy. *People v LeBlanc*, 465 Mich 575, 578; 640 NW2d 246 (2002). Rather than objecting and calling more attention to the unresponsive testimony on direct examination, trial counsel attempted to impeach the employee by disclosing the limitations of the employee's direct knowledge of the alleged theft and revealing that the dealership made no formal complaint about the missing speakers. We do not find plain error under these circumstances.

Affirmed.

/s/ Jessica R. Cooper  
/s/ Peter D. O'Connell  
/s/ Karen M. Fort Hood